

REMARKS

A. Traverse of Restriction Requirement and Summary of Interview of February 17, 2006

Applicants acknowledge the interview and the election of claims 12 and 17. Applicants strenuously object to the restriction requirement. It is improper and unduly burdensome, particularly in view of the prosecution history of this application.

<u>DATE</u>	<u>ACTION</u>	<u>REMARKS</u>
February 4, 2002	Application filed	Included claims 12 and 17 in original form as dependent claims
April 11, 2002	Information Disclosure	Citing Freedman '618 and other references
June 30, 2004	Office Action	Freedman '618 considered by Examiner but not cited as basis for rejection
September 27, 2004	Response	Amends independent claims
December 28, 2005	Office Action	Numerous claims (including claims 12 and 17) indicated as allowable if submitted in independent form. Considered references include Freedman '541.
March 11, 2005	Response	Per Examiner's suggestion, amended various allowable claims (including claims 12 and 17) as independent claims. Incurred excess claim fee of \$800 for these changes.
June 2, 2005	Restriction Requirement	Restriction as to claims already examined and placed in independent format at suggestion of Examiner to be allowable if so amended.
July 22, 2005	Election with traverse	Noted that the excess independent claims were created at the suggestion of the Examiner and resulted in excess claim fee of \$800.
October 18, 2005	Final Office Action	Claim 17 allowed and claim 12 allowable if written as dependent claim. Again, Freedman '618 before the Examiner and considered as a matter of record.
November 10, 2005	Rule 116 Amendment	Incorporated Examiner's suggestions (i.e., objected dependent claim 12 submitted as independent claim).
December 8, 2005	Final Office Action	New cited art but indication of allowability of claims 12 and 17. Again, Freedman '618 before the Examiner and considered as a matter of record.
February 7, 2006	Rule 116 Amendment	Canceled rejected claims to place in condition for allowability
February 17, 2006	Restriction Requirement	Restriction as to claims already examined and placed in independent format at suggestion of Examiner to be allowable if so amended.

March 29, 2006	Office Action	Rejection of claims 12 and 17 including rejection on previously considered Freedman '618.
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Applicant has filed a continuation application on claims canceled with the February 7, 2006 amendment.

The restriction requirement is improper for the same reasons it was improper in June 2, 2005. The restriction requirement should be withdrawn for the same reasons given in July 22, 2005 and resulting in consideration of all claims in October 2005. The claims have already been searched and examined on numerous occasions. So searched and examined the claims have received an indication of allowability. In reliance upon the Examiner's indication of allowability, dependent claims have been written in independent format resulting in Applicants paying an \$800 excess claim fee. Applicants also respectfully submit there is no serious burden on the Office if restriction is not required within the meaning of MPEP § 811.

Throughout the prosecution of this application, Applicants have made earnest attempts (at great expense to Applicants) to comply with the Examiner's suggestions (e.g., amending depending claims into independent format). These changes were made in reliance on indications of allowability made on several occasions.

B. Objections Based On Prior Art

1. Summary of Prior Art Cited As A Basis For Rejection

i. U.S. Patent No. 5,176,618 to Freedman issued January 5, 1993 ("Freedman '618")

1. Prior Indication Of Allowability Of Claims 12 and 17 Over Freedman '618

Before proceeding with a discussion of Freedman '618, Applicants respectfully point out that Freedman '618 was considered by the Examiner at least as early as June 30, 2004. With this consideration, claims 12 and 17 were indicated as allowable (except only for being dependent of rejected claims) over Freedman '618 and other considered reference on each of December 28, 2005; October 18, 2005 and December 16, 2005.

2. Relevant Disclosure Of Freedman '618

Freedman '618 teaches a magnet 90 in the pharyngeal wall (Fig. 5). Applicants' disagree that Freedman '618 must necessarily compress tissue when placing the magnet 90 in the pharyngeal wall. Placing of a device in tissue can easily increase the bulk of the tissue without compression. Freedman '541 is silent on this point and, accordingly, most certainly does not teach compression.

Furthermore, Freedman '618 would suggest no teaching for compressing or altering the airway structure or the shape of the pharyngeal wall. Freedman '618 is attempting to alter only the soft palate or epiglottis. This is illustrated in Fig. 6 and discussed in Column 7, lines 35 – 49. There is no re-shaping of the pharyngeal wall. In the event the pharyngeal wall is not rigid, a stabilizing magnet 16 (Fig. 7) is placed to stabilize the position of magnet 14. (Col. 8, lines 35 – 44). Therefore, not only does Freedman '618 not teach re-shaping the pharyngeal wall, it teaches away from such a re-shaping by describing techniques to avoid it.

ii. U.S. Patent No. 6,161,541 to Woodson issued December 19, 2000 ("Woodson '541")

Woodson '541 describes a surgical treatment for obstructive sleep apnea. Woodson '541 approaches the hyoid bone 20 by an incision through the skin (col. 3, line 3) and through the platysma muscle 26 (col. 3, line 8) to expose the hyoid bone 20. In one embodiment, the exposed hyoid bone is split (col. 3, lines 44 – 50, and compare Figs. 3(a) and 3(b)). The split segments of the hyoid bone are tied to sutures (col. 3, lines 52 – 62). The sutures are connected to bone screws previously placed in the mandibular body (jaw bone). (Col. 3, lines 14 – 33).

The hyoid distension or suspension taught by Woodson '541 is a surgical procedure with all access to the hyoid bone being through the skin external to the throat. There is no access through the pharyngeal airway.

There is no compression of the airway tissue. In fact, Woodson '541 does not so much as touch the pharyngeal wall.

C. Amendments To Claims

Notwithstanding Applicants' earnest belief that the claims are allowable over the references, Applicants amend claims 12 and 17 in a manner to more clearly distinguish over the art in order to advance prosecution of this application. Woodson '541 does not show or suggest accessing the pharyngeal wall through the airway. In fact, the surgical procedure requires the external throat access described in Woodson '541. Freedman '618, previously considered by the Examiner before indications of allowability of the claims, does not show compression or any alteration of the pharyngeal airway. Nor does it describe treating a transverse portion of the wall surrounding the airway.

D. Summary

As amended, claims 12 and 17 clearly distinguish from the cited references.

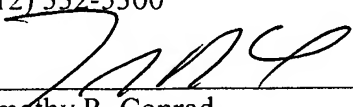
The restriction requirement is inappropriate. In addition to claims 12 and 17, claims 2 – 9 and 22 – 24 are allowable and should be indicated as such. These claims have already been examined and indicated as allowable on numerous occasions.

In view of the prosecution history, Applicants respectfully submit a telephone conference with the undersigned is in order if the Examiner has any remaining issues with this application.

Respectfully submitted,

MERCHANT & GOULD P.C.
P.O. Box 2903
Minneapolis, Minnesota 55402-0903
(612) 332-5300

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Timothy R. Conrad
Reg. No. 30,164
TRC:lmb

